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Debate on Birthright Citizenship

Dr. John Eastman & Professor Ediberto Román***

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** Professor Román is a nationally-acclaimed scholar and an award-winning educator with broad teaching interests and an extensive scholarship portfolio. From 1995 to 2002, he was an associate professor and then professor of law at St. Thomas University School of Law. In 2003, he joined the Florida International University College of Law as a founding faculty member, then serving as Associate Dean for Academic Affairs from 2005 to 2007. His principal research interest involves analyzing the construction and interpretation of constitutional law and immigration policy. Professor Roman has published law review articles, news columns, blog essays, and book chapters on immigration policy, international law, securities regulation, evidence, con-

The following is the transcript from a debate between Dr. John Eastman and Professor Ediberto Román, and moderated by Dean of the Florida International University College of Law, Alex Acosta. This debate took place on February 24-25, 2011 as a part of the FIU Law Review's Symposium on immigration reform in the United States. Specifically, this debate centers on the Fourteenth Amendment and birth-right citizenship. Both Dr. Eastman and Professor Román were given ten minutes for their own remarks, beginning with Dr. Eastman. After the opening remarks, the debate goes into a brief back-and-forth between Dr. Eastman and Professor Roman before concluding with questions from the audience.

JOHN EASTMAN: Thank you, Dean Acosta, Professor, all of you. I wish I could have been with you for the whole conference. The other duties of an academic and litigator sometimes intrude. But it looked to be a very interesting conference, and I'm delighted to be here to see your beautiful facility and to spend some time in south Florida. Although you have this thing called "humidity" that we don't have over in California. I'm still getting used to it.

Before I begin my formal remarks about the birthright citizenship controversy, I want to put it into a larger context about the larger debate over illegal immigration. And I stress the word "illegal." Most of what I heard this morning, the comment about anti-immigration, while true on some segment of the political spectrum of folks on my side of these issues, is a fairly narrow segment, just as there's a narrow segment of fairly extreme folks on the other side who claim, for ex-

stitutional law, critical race theory, post-colonial discourse, affirmative action, and law and literature. His first two books on colonialism, citizenship, and nationality – *The Other American Colonies: An International and Constitutional Law Examination of the United States' Nineteenth and Twentieth Century Island Conquests* (Carolina Academic Press) and *Citizenship and Its Exclusions: Classical, Constitutional, and Critical Race Perspectives* (New York University Press) have received critical acclaim. His notoriety and expertise in the immigration area also recently led him to be asked by the Southern Poverty Law Center, arguably the country's leading civil rights public interest law firm, to advise them on a host of matters. In fact, he recently served as an expert witness in one of their major class action lawsuits. More recently, he was recently asked by the dean at Escuela Libre De Derecho – Mexico's premier law school – to translate several of his recent immigration articles for an upcoming book celebrating that institution's leadership in law. Professor Román also recently finished his second book for NYU Press – *Those Damn Immigrants: America's Hysteria Over Immigration*, and is finalizing a second book to be published in 2012, entitled *Understanding Immigration*. His writings have been featured in the Constitutional Law Professors blog, the Faculty Lounge, the Immigration Professors blog, the Law Prowfs blog, the Immigration Professors blog, Dissenting Justice, and the blog he created, Nuestras Voces Latinas. In 2011, he also became a regular and featured columnist for the Huffington Post.

ample, California's not part of the United States. And I think we ought to focus on the distinction between legal and illegal, because that's what drives most of the policy discussion.

The second thing I want to talk about is this: I agree with, I suspect, most of you in this room, certainly most of those that have been participating in the conference thus far, that the current situation is not only deplorable, but immoral. What we've done in creating a class of outlaws living among us who don't have recourse to the law, who don't have recourse to employment or education opportunities, I think is terrible. And one has to stand back and ask why that is. On the one hand, it's easy to say, "Well, we've just got a bunch of nativists anti-immigrant folks in this country that don't want to open the doors." I do not think that is true. And proof that it's not true, I think, that my former boss, Ronald Reagan, while president, signed the first large amnesty, the Immigration Reform and Control Act of 1986. The issue, rather, is how to provide a system or mechanism that prevents the incentives for creating that unlawful presence in the United States, that creates a population that could be preyed upon, either by public officials in this country or by unscrupulous people who will take advantage of them. And the premise of the Immigration Reform and Control Act was, by giving amnesty, we would also stop the incentives for future illegal immigration that would exacerbate the problem that the amnesty was designed to prevent.

Now, what we found as a result of the amnesty was that word went out that if they did it once, if we overwhelmed them with numbers, they will do it again. And it created an even greater incentive to create an unlawful population and exacerbated the problem. And so I want to try, instead of repeating that same strategy from before, look at ways to remove the four incentives to illegal immigration, to put pressure on Congress to increase, radically increase, legal immigration, and streamline the process. And I think as long as you've got that safety valve of illegal immigration, the pressures won't be brought to bear to increase that.

And so what are the four principle magnets? Well, one is an un-enforced, porous border. The second is employment opportunity. The third are social welfare benefits across the spectrum. And the fourth is the one we're going to talk about today: birthright citizenship – that automatic citizenship conveyed upon anyone born on U.S. soil, or so the current understanding goes. I think that current understanding is actually wrong, as a matter of first principle of what the Fourteenth Amendment actually says and what it was intended to do. And I'm going to lay out the case about why I think the Fourteenth Amendment does not provide automatic citizenship for anyone born on U.S.

The language of the Fourteenth Amendment of course has two discreet elements. “All persons born – that’s the born on U.S. soil part – or naturalized in the United States *and subject to the jurisdiction thereof* are citizens of the United States and of the state wherein they reside.” Two elements: birth and being subject to the jurisdiction. Now, in our common parlance today, “subject to the jurisdiction” means that you are subject to our laws. And anybody that is physically present within the United States is subject to our jurisdiction in that sense. But that makes that phrase almost entirely redundant - the birth on U.S. soil phrase. We tend to avoid interpretations that write redundancies into the Constitution.

Now, there is an interpretation of “subject to the jurisdiction” that makes it not redundant, although only in a minor way. This language, some have argued, was intended simply to exclude the children of diplomats or the children of occupying enemy armies. I think it actually did more than that. And if you look at the legislative history, the debates on the floor of the Senate where the citizenship clause – remember when the Fourteenth Amendment was passed out of the House of Representatives, it did not have a citizenship clause. It was introduced by Senator Howard on the floor of the Senate. And he was, during the course of the discussions, asked precisely, “What do you mean by this citizenship?” And everybody understood what they were trying to do with the Fourteenth Amendment was constitutionalize the 1866 Civil Rights Act. The 1866 Civil Rights Act, they thought, was on uncertain constitutional terms, whether Congress had exceeded its authority under the powers given to it under the Thirteenth Amendment. And even if it was constitutionally valid, they were concerned that a future Congress might repeal the 1866 Civil Rights Act. So they wanted to lock it into the Constitution. And that was the principle purpose of the Fourteenth Amendment.

And with respect to the Citizenship Clause, the 1866 Civil Rights Act, I think, is very clear. It said, “All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States.” Now, you might argue that “not subject to any foreign power” is more clear on the question of whether somebody born here to parents who are subject to foreign powers, who are still citizens of Ireland or Mexico or Japan or what have you, would clearly not be citizens under the 1866 Civil Rights Act. Maybe the change in language to the Fourteenth Amendment, “subject to the jurisdiction,” was intended to broaden the grant of citizenship. If you look at the debates, though, you will see that the change had one purpose in mind. When it said “not subject to any foreign power,” the issue was whether children of Native Americans, “Indians” in their terminology, were automatically citizens.

They weren't subject to a foreign power, because the Indian tribes were domestic powers; separate sovereigns, to be sure, but domestic, not foreign. And that created some problems under the 1866 Act's language. So the sole purpose of the change in language was to avoid that issue.

Then Senator Lyman Trumbull was asked point blank, "Well, what do you mean? Doesn't this mean that Indians living on the reservation are going to be covered by your new clause since they were, quote, 'most clearly subject to our jurisdiction both civil and military?'" Senator Lyman Trumbull, who is one of the key figures in the drafting and ratification of the Fourteenth Amendment, responded, "What the phrase that we're using means is that it's complete jurisdiction, not owing allegiance to anybody else." And Senator Jacob Howard, who actually introduced the language of this Clause, contended that it should be construed to mean "full and complete jurisdiction," the same extent that we have now under the 1866 Civil Rights Act.

Now, to try and clarify what this distinction they were drawing is, think about tourists from Great Britain, from London, who come over here on a temporary vacation. They are subject to our partial jurisdiction while they're here. They have to follow our traffic laws. They have to follow a lot of laws. They drive on the right side of the road rather than the wrong side – I mean the left side! – of the road while they're here. But we don't draft them into the Army. They don't get prosecuted for treason if they take up arms against us. They don't owe allegiance to our country, because they remain citizens of their sovereign, Great Britain. Partial and territorial jurisdiction versus this broader, complete jurisdiction is what Howard and Trumbull both say they had in mind.

Now, it's not just the debates in Congress. The first executive decision on this reached the same conclusion. Attorney General Williams in 1873 takes up the issue on what it means, when dealing with an interpretation of the Expatriation Act that was addressed at the same time. He wrote: "The citizenship clause, the words are 'jurisdiction' in it must be understood to mean 'absolute or complete jurisdiction.' Aliens, among whom are persons born here but naturalized abroad, dwelling or being in this country are subject to the jurisdiction of the United States only to a limited extent. Political and military rights and duties do not pertain to them."

Moving to the first Supreme Court cases to look at the issue: In *The Slaughterhouse Cases*¹, which is the first Supreme Court case to look at anything dealing with the Fourteenth Amendment, the Su-

¹ 83 U.S. 36 (1872).

preme Court agreed with the interpretation I have described. Granted, in *Slaughterhouse* the language is dicta, because this particular question wasn't presented. But in reaching their holding in *Slaughterhouse*, the Justices looked to the language of the Fourteenth Amendment, and here's what the majority in the case wrote: "The phrase was intended to exclude from its operation the children of ministers, councils, and citizens or subjects of foreign states who are born within the United States." And there was no dispute on that issue between the majority and the dissent. Their dispute in the case was on other issues.

Again, that was clearly dicta, but in *Elk v. Wilkins*² in 1884, the Supreme Court directly interpreted the Citizenship Clause of the Fourteenth Amendment. There was an Indian who had been born on U.S. soil, but owed allegiance to the tribe. When he came of age, he renounced his allegiance to the tribe and he asked to be treated as a U.S. citizen because of his birth on U.S. soil. The Court there said, "No. At the time you were born, you owed your immediate allegiance to your tribe, a separate sovereign, not to the United States, and that does not qualify for 'subject to the jurisdiction' under the Fourteenth Amendment."

It is true that in 1898, the Court took a different turn, in a case dealing with a Chinese-American born on U.S. soil to parents were lawfully and permanently here. The court held that Wong Kim Ark's birth on U.S. soil was sufficient for him to be a citizen.³ But by being lawful, permanent residents, his parents had a degree of allegiance different in kind than those who are here only temporarily, and certainly those who are here unlawfully. The treatise writers of the day, what have you, I think all agreed with this interpretation.

So let me close with this, because I'm at the end of my ten minutes, and this is kind of the underlying theory of it. This, I think, is more in line with the principle in the Declaration of Independence, that we create systems of political government by consent of the governed, mutual consent. The old *jus soli* doctrine – once born on the King's soil, always the King's subject – is something we renounced in the Declaration of Independence. I think this bilateral consent understanding of the Fourteenth Amendment, that I believe they actually intended to codify in the Fourteenth Amendment, is more compatible with that principle of the Declaration of Independence.

Now, that's not to say that we shouldn't be offering, as a matter of policy, citizenship to all sorts of different categories of people. But under our Constitution, the authority, the discretionary power, the

² 112 U.S. 94 (1884).

³ *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

plenary power, to make those policy judgments is vested in Congress in Article One's naturalization clause. The Fourteenth Amendment sets a floor that they can't go below, but how far above that floor they choose to go is a matter of the policy judgment of Congress. Thank you very much.

[applause]

EDIBERTO ROMAN: First, I want to thank Professor Eastman for attending this symposium and making it a lively event. As you all witnessed, he has a great ability in terms of making a very strong argument, and without question in terms of being a scholarly leader, and an activist in certain circles.

Unfortunately, in this context, his position, while having some force at first glance, is not nearly as impressive as he is. In terms of this issue, I have just about every conceivable way to address interpretation and language on my side. First, supporting my position are numerous United States Supreme Court decisions, as well as executive actions, and the very language of the Fourteenth Amendment itself. Nevertheless, I want to start with a point that Professor Eastman suggested – that the language of “being born” and “being subject to” is redundant. Shortly after making that assertion, Professor Eastman conceded the likelihood, or certainly the possibility, that the drafters of the Fourteenth Amendment were talking about diplomats and Native Americans. So it appears, as Eastman Acknowledged, that the “subject to” language was not redundant, and the legislative history supports my interpretation.

In addition to the legislative history of the Fourteenth amendment, which I will address shortly, support for my position stems from the common law view of birthright, the legislative understanding of the term “subject to jurisdiction,” the legislative understanding and the plain meaning of the “subject to” language at that time, the subsequent understanding of that Fourteenth Amendment by the United States Supreme Court, and a long history of consistent executive and executive agency interpretations. My last point is one I suspect in which Professor Eastman would agree. I could characterize it as simple logic – if we follow Professor Eastman's proposal, we would lead to arguably be inconsistent and absurd results.

At this point I think both sides would agree that the legislative history on the issue is determinative. As Professor Eastman alluded to, in interpreting the Fourteenth Amendment, Congress looked closely to the Civil Rights Act of 1886. In terms of the debate of that issue, in terms of key language, Senator Cowan asked Senator Trumbull whether this language, language of “being born and not subject to any foreign power,” would make children of Chinese and Gypsies, who were born in this country, citizens. Trumbull replied, “Undoubt-

edly.” This fact is terribly important in this context. Because when we look at the issue of the Chinese, at that time, they could not naturalize because of the Naturalization Act of 1790. So even looking at Professor Eastman’s approach, the Chinese were not under the full and complete jurisdiction of the United States. Yet under the Civil Rights Act, Trumbull, the person who sponsored the Act, would make them citizens. Moreover, in the context of Gypsies, it is quite interesting because there was some real debate as to whether the United States even had Gypsies at the time. But more importantly, they were analogous to the undocumented people of today – a silent and shadow population. And in both instances, Trumbull in responding to Senator’s Cowan’s question, unequivocally stated they would be U.S. citizens by birth.

In terms of issues of birthright citizenship, other important documents at the time shed considerable light. In particular, a letter from Senator Trumbull to President Andrew Johnson unequivocally states that birthright citizenship is dependent on whether the parents of the children born in the United States were permanently living, domiciled, in the United States. So as opposed to a notion of allegiance – what we’re really talking about was domicile – which is not only consistent with the language that I alluded to in terms of the legislative history, but also with hundreds of years of federal court interpretation and executive branch action.

In terms of the amendment itself, the Senate debate was enlightening. There really wasn’t a House debate. In terms of one of the first important indications, Senator Benjamin Wade, during an important discussion on the issue, said, “I have always believed that every person of whatever race or color who was born within the United States was, in fact, a citizen.” The immediate subsequent exchange sheds even more light. Evidently Senator Wade was being questioned – perhaps cynically – and he responded “The Senator from Maine, Senator Pitt, suggests to me in an undertone that persons may be born in the United States and yet not be citizens. Most assuredly they would be citizens of the United States, unless they went to another country and expatriated.”

The last two legislative exchanges on the matter seals the issue. Senator Fessenden then raised the very issue before us. He says, “Suppose a person is born here of parents from abroad temporarily in this county?” Senator Wade observes “I know that this is so in one instance in the case of children of foreign ministers who reside near the United States. I agree to that position. But my answer to the suggestion that it’s a simple matter, one involving one, two, three or four individuals, and it would be best not to alter the law of citizenship for that case.”

Later, Senator Conness, a naturalized citizen himself, observed, “The proposition before us I will say, Mr. President, relates to the children begotten of Chinese parents in California,” that was the great fear of the day, “...shall be citizens. I voted for the proposition to declare that children of all parentage whatsoever, born in California, should be regarded as citizens of the United States.” Thus, the legislative history of the Congress enacting the Fourteenth Amendment is consistent—and that consistent interpretation was that if one is born in the United States, one was to be considered a U.S. Citizen.

Now, I’m fairly confident Professor Eastman will refer to certain legislative history that suggests some ambiguity, particularly in the context of allegiance. That language, I propose to you, and I would strongly suggest you research on your own, as I often ask my students to do in class, relates to, and merely confirms, a legal fiction then and still in existence concerning Native Americans as being subject to another jurisdiction—their own. This language in question, which Professor Eastman will likely use, was part of the legislative history because the congressman in question were seeking to confirm that the fiction associated with the treatment of indigenous people would still be in place after the passage of the Fourteenth Amendment; the fiction of a sovereign within a sovereign, which created an illogical and even absurd paradox. Thus, that language was in the congressional debate merely as an effort to be consistent with an already recognized exception to the Fourteenth Amendment; it was not creating a rule or interpretation on the citizenship status of persons born in the United States.

Basically the Fourteenth Amendment is viewed to have codified the centuries old common language of *jus soli* providing for birthright citizenship for every person born on British soil. And much like the interpretation of the Civil Rights Act of 1886 and the Fourteenth Amendment itself, the exceptions were the same, basically dealing with foreign diplomats and foreign combatants. Thus, the legislative history suggests, indeed strongly suggests, that the “subject to” language of the Fourteenth Amendment meant “under the authority of” or following the potential punishment, let’s say, of the power of the government.

But the most relevant language relating to the “subject to” language came from Senator Jacob Howard, the amendment’s sponsor, where he said, “The word ‘jurisdiction’ ought to be construed so as to imply full and complete jurisdiction. The United States’ courts have no power to punish an Indian who is connected with a tribe for a crime committed by him,” speaking to individuals like diplomats that were subject to the laws of another sovereign in terms of the issue, and not at all questioning the domicile issue. So it seems to me the lan-

guage of the Fourteenth Amendment makes clear that what Congress was talking about was authority over the individual, not allegiance. In fact, the leading legal interpretation of that language during this era is consistent with my position. Looking to the 1882 *Etymological Dictionary of the English Language*, the important dictionary of its day, you will see that it said that “subject to” basically means “laid or situated under . . . under the power or authority of another.”

Modern day interpretation as well as subsequent Supreme Court interpretation is likewise consistent with my position. As seen in the leading Supreme Court case interpreting the Fourteenth Amendment’s Citizenship Clause – *U.S. v. Wong Kim Ark*⁴, where the Supreme Court addressed the issue – and where I suspect Professor Eastman will characterize as dicta – he must characterize it as such because that Court’s language is so damning to his position. The Court in *Wong Kim Ark* held that “every citizen subject of another country who is domiciled here is within the allegiance and protection, and consequently subject to the jurisdiction of the United States.” It can hardly be denied that an alien is completely subject to the political jurisdiction of this country in which he resides. I posit that this language is far from dicta; it is the Supreme Court addressing a constitutional amendment as to its scope and breadth completely.

My interpretation is thus on point, unlike the *Elk*⁵ decision that Professor Eastman cites, which again was addressing the peculiar status of Native Americans because of prior Supreme Court rulings, and unlike *the Slaughterhouse Cases*⁶, which didn’t address the citizenship clause. *Wong* did. Indeed, subsequent Supreme Court decisions also support my position and cases, like *Plyler v. Doe*⁷, specifically rejected punishing U.S.-born children for the wrongs of their undocumented parents, and taking it as a given that children born in the United States are United States citizens.

A related point, in *INS v. Rios-Pineda*⁸, which I’m sure Professor Eastman will also characterize as dicta, also contains useful language. The Court recognized that in a matter involving deportation proceedings that were instituted against respondents, who by that time had a child who, and the child being born in the United States, was a citizen.

The last point I want to raise, think about the consequences of such Professor Eastman’s position. We’re going to have situations where more individuals are excluded, more partial members of our

⁴ 169 U.S. 649 (1898).

⁵ *Elk v. Wilkins*, 112 U.S. 94 (1884).

⁶ 83 U.S. 36 (1872).

⁷ 457 U.S. 202 (1982).

⁸ 471 U.S. 444 (1985).

society. And as I alluded to in a recent book, *Citizenship and its Exclusions*, that's the last thing, given our less than ideal history on race relations, the country should be doing. This country needs to be moving ahead to having a more inclusive society. The consent-based Lockean theory that Professor Eastman refers to in his presentation, speaks to the fact of something akin to the primary and exclusive power of one branch of government. According to Eastman's view, Congress can do whatever Congress wants to do, including treating naturalized citizens differently than other citizens, and including creating levels of members of society, notwithstanding an American ethos that strongly suggests all citizens are equals.

I will close with having you think of these scenarios: Under a non-birthright citizenship scenario, parents that have overstayed their visas could have one child being a citizen and have another child being an undocumented individual. Let's look at another one: How do we treat children of a relationship where you have one parent being a citizen and one parent being undocumented? How do we decide that? Mother? Father? Who's older? Younger? We're going to create more levels and variances.

Let me end with one thing, the classic statement that we hear at orientation. Look to your left. Do so, please. Look to your right. Who's a citizen? How are we going to describe them? If it is not going to be birthright, it's going to be other things. Maybe what we will have will be levels of Americans, based on the colors of green or limited citizenship cards, or other arguably challenging (and maybe illogical) conclusions. Thank you.

[applause]

JOHN EASTMAN: Okay. So we're both familiar with the drafting debates in Congress. I have a different reading of those debates, and I want to explore our differences a little bit because Professor Roman's argument puts the two segments of the debate in conflict. It puts the debate over Indians in conflict with the debate over Chinese and Gypsies. And I do recognize that that exchange between Senator Cowan and Senator Conness is critical to understanding the meaning of the Citizenship Clause. I just have a different take on it. My take, I think, reconciles the two parts of the debate. Yours has them in permanent conflict.

So the issue in the Indian discussion was, because they owed allegiance to a separate sovereign, they would not be treated as subject to the jurisdiction even if born on U.S. soil. And my claim is that that principle, that not owing allegiance to a foreign sovereign or the domestic sovereign, as in the case of Indian tribes, was what they meant by "subject to the jurisdiction." So then you get this question by Senator Cowan, who was a bit of a racist, clearly opposed to the Fourteenth

Amendment generally. He says, “If you’re going to do this, you’re going to give citizenship to the children of Gypsies and the children of Chinese.” And Conness says, “Yes, that’s right.” All right? But it’s important to recognize the context in which that discussion occurs. There were efforts at the time to only allow citizenship for the children of white European immigrants. And what Conness is saying is it doesn’t matter what nationality they’re from, if they are lawfully, permanently domiciled – to use the language from Senator Trumbull in the letter to the President – permanently domiciled from whatever region in the world they came from, whatever their nationality, whatever their ethnic background, if they are lawfully, permanently domiciled in the United States, their children will become citizens. And it’s that distinction. Because becoming lawfully, permanently domiciled in the United States, you have taken a step toward renouncing the former allegiances that gave the Senate trouble on the context of the Indian question, the other part of the debate.

And so presented with that question, Senator Conness says, “Yes, they would.” But significantly – before he says “yes, they would,” he says, “I fail to see how Cowan’s concerns relate to Section One, because he also claims that we’re going to give this to mere sojourners, if travelers come here. Just because they get the protection of our laws, they’re not citizens, their children shouldn’t be.” And Conness says, “I fail to see how that concern relates to Section One. But as to your question about the Gypsies, who are lawfully, permanently domiciled here, of course their children will be citizens. That’s what we’re setting out in the Fourteenth Amendment.” That retains the distinction between partial and territorial jurisdiction, on the one hand, and the more full and complete jurisdiction that Senator Howard talked about, on the other, which reconciles it with the discussion over Indians in the earlier part of the debate, and ties it more directly to the text of the 1866 Civil Rights Act. Moreover, this reading of the discussion is fully consistent with the *Slaughterhouse Cases*⁹ and *Elk v. Wilkins*¹⁰, the Attorney General opinion, and the leading treatise writer of the day. Not a dictionary author, but the leading treatise writer of the day, Thomas Cooley, to whom we often look for the definitive interpretation of the Fourteenth Amendment, because he was writing contemporaneously with it and was highly regarded. And here’s what he says: “subject to jurisdiction” meant full and complete jurisdiction to which citizens are generally subject, and not any qualified and partial jurisdiction such as may consist with allegiance to some other gov-

⁹ 83 U.S. 36 (1872).

¹⁰ 112 U.S. 94 (1884).

ernment. And that was in the contemporaneous leading treatise of the day in the 1870s, the understanding of the Fourteenth Amendment. I think that's the correct understanding.

Now, granted, in *Wong Kim Ark*¹¹ in 1898, during the course of the holding that Wong Kim Ark, who was the child of a lawful, permanent resident – her parents were not allowed to become U.S. citizens because of a treaty that we entered into with the emperor of China that refused to recognize the right of expatriation, the natural right of expatriation, that our Declaration of Independence demands. And so there was this treaty that we entered into contrary to one of our most basic principles. In that context, the court held that their children, because they had done everything they could to become citizens of the United States that we would allow them to do, they'd become lawful, permanent residents. We wouldn't let them go any further. The court held that their children were citizens.

Now, in the course of that holding, the court has a lot of what I consider dicta. Professor Roman would think it is essential to holding. I do not. If you accept that there is a distinction between partial and territorial and complete and whole jurisdiction, then that other discussion is dicta. It's clearly dicta in *Plyler v. Doe*¹² and clearly dicta in *INS v. Rios-Pineda*¹³. This is why Judge Richard Posner on the Seventh Circuit has recently held that this is an open question. This is why Judge Sam Alito, when he was asked about this during his confirmation hearing, refused to answer, saying, "Recent scholarship has demonstrated that this is an open question." And the Supreme Court has actually not addressed the precise issue, which is whether the children of those who are not present in the U.S. lawfully, therefore not here with consent, not here fully subject to the jurisdiction, even though clearly subject to the partial or territorial jurisdiction that goes along with anybody within the territorial borders, whether those children are automatic citizens by virtue of the Fourteenth Amendment or whether we need an act of Congress to provide that above the floor of the Fourteenth Amendment. I believe it remains an open question, and I suspect we're going to see litigation over it very soon. Thank you.

[applause]

EDIBERTO ROMAN: I want to address a few inconsistencies that were raised by my able opponent. And the first one he makes, he refers to the Trumbull letter to President Johnson. And I was quite

¹¹ 169 U.S. 649 (1898).

¹² 457 U.S. 202 (1982).

¹³ 471 U.S. 444 (1985).

impressed, because when he referred to that letter, he talked about lawful, permanently domiciled. Unfortunately, the letter doesn't refer to that language – Professor Eastman included the word “lawfully” into the letter. So by adding that language, he assists his position. Sadly, the language “lawfully” is not in the letter.

In terms of the determination of whether a treatise writer versus a plain meaning understanding of a term is dispositive, I perhaps will switch hats and take the textualist approach, to take the classic view of the understanding of a word. And when we think of the word being subject to the laws of the state of Florida, it's entirely consistent with the understanding of the day and the understanding of, essentially, every case, not just Supreme Court case, that recognizes “subject to the law” as the fact that you have to obey the laws of your jurisdiction. And again, center to the discussion with respect to all of these issues was the focus on being domiciled within the jurisdiction.

Looking to the language that alludes to allegiance, as I referenced before, Congress was referring to that illogical and arguably immoral position by a previous Supreme Court in creating a fiction of having sovereigns within a sovereign, and yet being wards of the first sovereign. And again, the Wong Kim Ark case has to be dicta for his position, and the reason for this is that the Court was so explicit and unequivocal on that matter that most scholars view the issue as resolved by the case. In fact the quote in question is actually a very long, and I want to just take a moment to refer to it, because it does speak to the full scope and breadth of the Fourteenth Amendment. None of the cases he cites, Supreme Court or otherwise, come close to addressing this issue. “The Fourteenth Amendment affirms, as I have said, the ancient and fundamental rule of citizenship by birth within the territory. The amendment, in clear words and in manifest intent, includes children born within the territory of the United States . . .” The other person's language referred to by Professor Eastman, again, consistently being the children of diplomats and enemy combatants in that context. And the powerful language of Wong Kim Ark is at the very end of this quote, “Every citizen subject of another country while domiciled here is within the allegiance,” essentially prophetically, saying, “Professor Eastman, I know you're going to raise this issue a hundred years later, and this is how I'm going to respond.” Every person born in the United States, outside the previously recognized exception of Indigenous People, is consequently subject to the jurisdiction of the United States. It can hardly be denied that an alien is completely subject to the political jurisdiction of the country in which he resides. Following the plain meaning understanding of the day, legislative language of the day, Supreme Court interpretations subsequent to this language, and, more importantly, following the common law that we

adopted from England that never deviated with respect to birthright citizenship being fundamental, domicile being fundamental, to a determination of citizenship. Thank you.

[applause]

JOHN EASTMAN: Well, let me start off with a question, and it was raised by Professor Roman's sur-reply. What is the law in England?

EDIBERTO ROMAN: Well, in terms of the law in . . .

JOHN EASTMAN: You just mentioned the common law in England. I'm curious.

EDIBERTO ROMAN: Basically the law was consistent with the Civil Rights Act and the Fourteenth Amendment, that citizenship was based on being born there. And the exceptions were consistent in both statutes that made the exception for diplomats and made the exception for others including those. . .

JOHN EASTMAN: But you have to concede that we rejected at least part of the *jus soli* doctrine. The *jus soli* doctrine said everybody born on British soil is a British citizen or subject and can never renounce it. Those were the two sides of the *jus soli* doctrine. And we clearly rejected the back end side of it. I mean, the Declaration of Independence is the greatest example in human history of a rejection of *jus soli* on the natural right to renounce your allegiance. Now, that doesn't necessarily mean that we also rejected the front end, but we clearly rejected at least the back end part of the English *jus soli* doctrine in the common law. And when we talk about that we inherited English common law, it is always with the caveat to the extent consistent with the principles of the Declaration of Independence. So we clearly reject at least that portion, the expatriation portion, of the English common law, and the issue for us is did we also reject the front end portion of it as well.

EDIBERTO ROMAN: No, I think that's a good point. But the fact of the matter is that it has never been discussed in terms of the potential for rejection. The language you're referring to in *Elk*¹⁴ is an odd conclusion in light of a fiction that is created by a group, and we know the racialized nature of the *Elk*¹⁵ decision and the subordinate nature and treatment of the other in that context. So in terms of our understanding, there was no rejection. In fact, there's been repeated acceptance at every level: the numerous citations that I gave in terms of the legislative history, the Supreme Court cases, and particularly

¹⁴ *Elk v. Watkins*, 112 U.S. 94 (1884).

¹⁵ *Id.*

*Wong*¹⁶, that focused on the full scope of the language, repeated and consistent executive interpretation, not only by the President, but the agencies of that language.

So we're really looking at a proposition that seeks to change hundreds of years of practice and interpretation. And the burden would fall on my opponent with respect to that with clear intent in terms of what was to be done. I don't think he meant it.

DEAN ALEX ACOSTA: Questions from the audience?

AUDIENCE MEMBER: How would you propose, Professor Eastman, to implement this? Would it be a prospective implementation? And so we would not have retroactive implementation of the Fourteenth Amendment?

JOHN EASTMAN: Yeah, there are a couple of things on the way to answering that I think are important to note. Professor Roman said that every government agency has always assumed this view. I don't think that's accurate. And this is a longwinded way to get to your question, but I'll get there. For example, in dealing with the Indian question, even after *Wong Kim Ark*¹⁷, if it stood for the broad proposition that anybody born on U.S. soil, no matter what the relationship that their parents were to the United States, we would not have had a series of tribe-by-tribe statutes extending citizenship by naturalization rather than birthright by Congress, culminating in the 1923-1924 act of Indian citizenship.

We would have had claims of citizenship arising out of the 1920s guest worker program. And there's been a wonderful documentary that I participated in talking about some of the pretty rough repatriation efforts that went on after the Great Depression hit in the late 1920s. Lots of people here in the 1920s on the guest worker program were removed after the Depression because of the lack of jobs. As far as I've been able to tell, nobody raised the issue that the children that were being removed with them were citizens. The same thing in the Bracero program, lots of people here in that guest worker program, undoubtedly means that lots of children were born on U.S. soil while they were here. But at the end of the Bracero program, nobody's raising the issue, even as late as the 1950s, that you're sending U.S. citizen children back to whatever country the guest worker had come from. So this notion of automatic birth, I think, is a reflection more of a changed understanding of the language than what they had understood previously.

¹⁶ *Wong Kim Ark*, 169 U.S. 649 (1898).

¹⁷ *Id.*

What I would do, though, and I'm fully willing to concede that, at least over the last 30 or 40 years, we have believed the notion that birth was all that was required, and that people that have relied on that, there's a huge reliance interest. And so what I would do is I would just grandfather that in and make this policy forward, and then immediately give to Congress the ability, if they think that's too stringent a floor that the Fourteenth Amendment sets out, they can (by their naturalization authority) grant citizenship as far beyond that as they think appropriate. And there are very good policy arguments on both sides on why we should extend it very broadly, or a little, or somewhere in between. But my point is the Fourteenth Amendment doesn't decide those questions a priori.

DEAN ALEX ACOSTA: Professor Roman?

EDIBERTO ROMAN: If I may comment, I do, once again, acknowledge that at-first-blush, the strength of Professor Eastman's argument. But let's look at the sources and citations that support that proposition. We're looking at the treatment of indigenous people and the creation of them as others and outsiders and less than citizens, wards, dependent, inferior people. Isn't it a sad day that we have a proposition here that could have the effect in modern day times of treating people that were born in the United States as others and less than equal, to use the Supreme Court, racist Supreme Court decisions like *Elk*¹⁸.

And my second point, is a related one, where my opponent points out that there were no objections in terms of the writings and other means when the United States ended programs like the Bracero and guest worker programs of the past. Professor Eastman stated:

Lots of people here in the 1920s on the guest worker program were removed after the Depression because of the lack of jobs. As far as I've been able to tell, nobody raised the issue that the children that were being removed with them were citizens. The same thing in the Bracero program, lots of people here in that guest worker program, undoubtedly means that lots of children were born on U.S. soil while they were here. But at the end of the Bracero program, nobody's raising the issue, even as late as the 1950s, that you're sending U.S. citizen children back to whatever country the guest worker had come from.

I would venture to say there were a lot of objections, but they weren't people who were writing law review articles, or who had significant political influence at that time. They were largely poor people being deported in round ups, such as the ones in Operation Wetback, despite the fact many were born in the United States. To the extent

¹⁸ *Elk v. Watkins*, 112 U.S. 94 (1884).

they did not complain, the reason for this is not because our process was fair, but because our system was so unfair and was stratified with only some having access and ability to address their objections. More recently, when this academy became more diverse, professors like myself and others have written on that very same subject--on citizenship and the absurdity in terms of immigration, in terms of the treatment of individuals that were otherwise considered citizens, or should have been considered citizens, were deported. In fact, several Chicano studies' scholars have written several decades ago in terms of justice and equity. So there were people that complained. They were just not the people in power, or those that had access to the bully pulpit.

DEAN ALEX ACOSTA: Second row? Yes.

AUDIENCE MEMBER: Has there ever been a history of legislative bodies throughout government that argue what you're arguing now, that we should deny citizenship to those born in the United States?

JOHN EASTMAN: Most nations in the world do not give automatic citizenship to the children of visiting foreigners. And that's true whether they're lawfully and certainly unlawfully present, that the notion of birth be deemed automatic citizenship is rather rare. Even the British, where the institution was originated, have moved away from it in the context of those who are unlawfully present, and even, I think, temporarily legally present, in Great Britain. So this view that no matter what the circumstance of how you got to the United States, birth on its soil is sufficient, is the real outlier.

Now, that alone is not sufficient. The United States is an exceptional country. The fact that we're an outlier might be a good thing rather than a bad thing. We have to look at what it is. But it's clearly an outlier position, I think, in modern law.

EDIBERTO ROMAN: I agree with that in terms of what more and more countries are doing in terms of addressing the issue of citizenship. And I'm troubled by it, because at the end of the day, this is really not about birthright citizenship and full membership. This is about how you address the immigration debate. What we are talking about is the hateful rhetoric of immigration and its consequences. And as I pointed out in yesterday's presentation, and in one of my forthcoming books, in terms of the empirical studies, from all sides of the political spectrum, the U.S. government, the Congressional Research Council, National Research Council, even the Cato Institute, that have looked at the impact of undocumented immigration and recognized the positive, net positive, in a fiscal sense. Yet, what many policy makers do is that they blame undocumented immigration for our ills and seek to curb citizenship in order to further attack per-

ceived outsiders. Think about the ripple affect of such measures, especially in terms of race relations in this country.

So what do we do? We start parceling off our views on who can be citizens? We close borders? We make fences? Now we say, "You folks that used to be citizens, and we've always interpreted those like you as citizens, but we are now changing our minds." We will be creating more and more "others" in our political and democratic landscape. I do not believe that is the right way to go. Let's address the issue in economic terms between the states and the federal government, and find some real solutions instead of this kind of knee-jerk reactions.

DEAN ALEX ACOSTA: Let me, if I could, ask a question that I had during the comments, and that goes to the legislative history. And I don't know if this is legislative history or more of a transmittal document. But you used the word "lawfully domiciled," and then Professor Roman referenced that saying that it does not say "lawfully domiciled," and that struck me as a fairly significant point to address.

JOHN EASTMAN: It is a significant point. And he's right, the word "lawfully" is not there. It says "permanently living domiciled in the United States." But the word "domiciled" meant you had to be lawfully a resident. Just somebody that was there unlawfully was not considered to be domiciled. You had to be there with permission with intent to stay permanently. That was all encapsulated in the word "domiciled." So I added the "lawfully" shorthand to convey what the word "domiciled" meant. It was something different than mere sojourner status or residency.

DEAN ALEX ACOSTA: Other questions? Front row.

AUDIENCE MEMBER: This is for Dean Eastman. How does your position treat a child who parents were born a citizen and [indiscernible]? Would it follow other countries that would [indiscernible]? And would then [indiscernible] judge or discrimination?

JOHN EASTMAN: Yeah. This is a question that has plagued the political theorists for centuries, because we make several assumptions. When you move to a consent-based model, as I believe we did, the first assumption is that a child born is giving consent to joining a particular political regime. We infer that consent from the status of the parents. So that's inference number one. The way the political theorists have played this out is, if a child is born to parents that owe allegiance to different sovereignties, that the child is presumptive citizen of both until he comes of age and makes an election to choose one or the other. They didn't recognize the notion of dual citizenship, because that meant dual allegiances, which was a contradiction in terms for them. And so the way they played this out was by these assumptions. So what that means is a child of a U.S. citizen and non-U.S. citi-

zen would be subject to the jurisdiction through whichever parent was the U.S. citizen and would be a birthright citizen.

The difficulty is that, if the child was born on U.S. soil to, say, to a French mother and an American father, the French would recognize through the mother French citizenship as well. That creates a dual allegiance that was a contradiction in terms. And once the child comes of age, the ideal would be, “I choose the French citizenship over the American,” or visa versa. In practice, it’s where I end up staying and living and domiciling indicates which choice I’ve made and then they’re the citizen of that one.

DEAN ALEX ACOSTA: I think there was a question from – yes.

AUDIENCE MEMBER: Dean Chapman . . .

JOHN EASTMAN: Eastman. At Chapman. It’s all right.

AUDIENCE MEMBER: You never really addressed Professor Roman’s policy argument.

JOHN EASTMAN: Because I think they’re policy arguments, and that means I think they’re appropriate for Congress in its exercise of its naturalization power. They’re not interpretive arguments on where the Fourteenth Amendment’s floor is. I do think there are – the biggest policy argument is, mine is a more complicated system to run, because I’ve got to ascertain the character, the classification, the status of the parent, in order to know whether the child is an automatic citizen or not. Then that creates a level of complexity, I think, that’s inherent in a consent-based model rather than a *jus soli* model. And so that’s certainly a policy argument on why we might want to offer citizenship to everyone born on U.S. soil, no matter what the circumstances.

I think there are very strong arguments on the other side, particularly in the context of unlawful immigration. If we’re going to recognize the principle that we cannot be simply open to unlimited immigration without undermining the institutions of this society – and there’s some people who disagree with that, that the net benefit over time, once you get over the short-term frictions in such a system, that the net benefits outweigh it and we ought to do it. But there are costs in that, particularly with a standard of living much higher than most of the rest of the places in the world. An unlimited amount of immigration without any time restraints can radically alter our ability to deliver social services, what have you. And so there are huge costs. And if you accept that proposition, then how much immigration to allow and how quickly to allow it is a policy judgment assigned to Congress.

And if you say that, then things that allow you to end run those policy judgments – I happen to think the policy judgments that are in place right now are much too restrictive. But if you concede that

there needs to be a policy judgment made by law, and then you allow end runs around it through unlawful immigration, you've undercut that policy judgment and effectively repudiated the notion that Congress is the one we've assigned that policy judgment to.

And, quite frankly, I think we would end up more quickly with a much more generous and much more efficient streamlined lawful immigration process if we had not allowed 10- to 20-million unlawful immigrants to come here. The pressure on business to – I mean, big business, big agricultural as well as big labor, if they wanted to increase the lawful immigration and streamline the process, that's a coalition who could get anything through Congress in ten minutes if it wanted to. But unlawful immigration has allowed them a safety valve not to push that, and it's a safety valve that they have benefitted from, immorally in my view, by having what is akin to slave labor, people living in the shadows who cannot even complain about maltreatment for fear of deportation. I think that's unconscionable. But where we disagree is I think the strategy to put pressure to legalize more and streamline more, that gets undercut if you eyewink the unlawful trade, is the better course.

DEAN ALEX ACOSTA: The gentleman – I've been trying not – because I saw your arm getting tired, but we didn't make eye contact.

AUDIENCE MEMBER: I wanted to know what would happen in the case of a child born of foreign nationals who is not subject to the jurisdiction of a foreign power because it would be stateless and ineligible to gain citizenship from another country.

JOHN EASTMAN: There's only a few countries in the world that that would exist for. And in the current citizenship bills that are being proposed in a number of state legislatures, we address by that by just saying that "subject to the jurisdiction" means not subject to any foreign power, or a child who would owe no allegiance to any other foreign power otherwise would be a citizen. And so the stateless kid problem we solve by just saying that – what they were trying to do is avoid an allegiance to a foreign power. If you have no allegiance to the foreign power because the foreign powers don't recognize it, then you would be a citizen by mere birth, because there would be no other place where are you subject to the jurisdiction. The language, I think, of the 1866 Civil Rights Act is more clear on this: not owing allegiance to any foreign power. And the stateless child doesn't owe allegiance to any foreign power, so birth on U.S. soil would convey citizenship.

EDIBERTO ROMAN: I did want to address a point that Professor Eastman seems to be approaching--immigration, and I think that's at the heart or what's behind a lot of these discussions and debates. I think we have found a point of agreement, perhaps a significant point of agreement, in terms of how to address the relative strain and bene-

fits to our society. But where we do differ is the proposition that ending birthright citizenship is somehow an appropriate response. There needs to be some agreement on ways to address immigration, be it through a more conservative approach, like guest workers program, or perhaps programs like roads to citizenship. What is not working is people living in the shadows. I do not think the resolution is to create levels of membership and therefore inferiority. We've moved so far and it took so long, be it in the context of women rights, and continued struggles with others in terms of the LGBT community and other outsider groups. The thought of creating formally partial membership, I think it's unsound. It would lead to bad results and perhaps worse.

I do think the Court, in looking at this, won't be limited just to the legislative history, because the burden of changing a policy that has been consistently applied – though we differ somewhat on whether this is in fact the case – of changing a policy that is quite set, in my mind. That burden would necessarily be on Professor Eastman's side of ending birthright citizenship – to show some benefits associated with it, not more strife, not more inconsistency, not more exclusion. I certainly wouldn't want to see that in this country. I would want to see, irrespective of how we get there, some reform that addresses the issues that are before us.

DEAN ALEX ACOSTA: Professor Travis, then fourth row, then second row, then you're going.

AUDIENCE MEMBER: [indiscernible] the balance [indiscernible] for corporations being persons in the legislative history of the Fourteenth Amendment? And related to that, would Professor Eastman's view make foreign corporations born overseas [indiscernible] infants born in the United States be portable and retainable, indefinitely losing all their rights.

JOHN EASTMAN: And can I make independent expenditures now that Citizens United is on the table? There's no discussion about personhood for corporations in the debates on the Fourteenth Amendment. That's something that the court kind of comes to later. But I do want to reject the notion – there's a move afoot to kind of get rid of any notions of national sovereignty. It was kind of one of the new avant-garde waves in international law that – because every national sovereignty, every national border, classifies and distinguishes between those who are citizens of that nation and citizens of any other nation. I don't think there's any inferiority implied one way or another in there. If children are born here of Irish parents while they're visiting in the United States on a vacation to Disney World – I was going to say Disneyland, but that's my end of the country – then the child is an Irish citizen under my view. And when they return from their vacation they're back in Ireland. That doesn't imply any inferior-

ity one way or another. It just recognizes that there are different political communities in every part of the globe.

What we've got – and a huge draw because of our economy, because of our institutions – that a lot of people who are not part of our political community would like to become part of our political community. And the question is how best to manage that demand for new entrance into our political community. And we can say, “Well, we shouldn't manage at all, just let as many people come as they want all at once, no matter how they get here, lawfully/unlawfully,” I think that is a recipe rife with the kind of problems we've seen. And the reason I'm focusing on birthrights citizenship here. If we take the Fourteenth Amendment out of the question at all, I think we still have a serious policy question. I suspect you have it here. I know we have it in California. A huge and largely underground, almost a human trafficking birth tourism industry that exists because of this notion of birthright citizenship. I think if you take that away as one of the draws for illegal conduct and offset it by increase in streamlined processes for legal conduct, I think we would all be better off.

EDIBERTO ROMAN: I guess we would differ in terms of whether there would be a mark or a stain to have someone born here and have a sibling born here, one being a citizen and one being another an outsider or partial member of this society. We have a long and, at the very least, checkered history in terms of inconsistent application of our democratic ethos, I would not want us to resort to those eras. I think the *Elk* case is great example of making people who would otherwise be citizens, being treated as less than equals. I don't think moving towards more gradations of membership would resolve anything.

I think we can resolve, or at least engage in honest discussion about immigration. And because you believe in birthright citizenship does not mean you believe in open borders. I for one do not. And I for one – believe I'm one of the fairly rare academics leaning on the left, very pro-immigrant advocate, that acknowledges the strain, because I've looked at the empirical work. I don't believe it's as stark long term as some of the rhetoric goes on. I'd love to see studies. I'm unfamiliar with any on the birthright tourism. I'm not sure how you described it. It'll be an interesting conversation. But we need to have open and honest conversations. We don't need more rhetoric and we certainly do not need more partial and inferior members.

DEAN ALEX ACOSTA: I think I said fourth row over in the gray, and then we'll move here and over there.

AUDIENCE MEMBER: Is it true that the United States is one of the only countries that recognizes expatriation and the right to announce your allegiance to your country?

JOHN EASTMAN: No, no, no. We're one of the only nations that recognize birthright citizenship anymore.

AUDIENCE MEMBER: Okay. Well, during the Declaration of Independence [indiscernible] that you have the right to [indiscernible].

JOHN EASTMAN: Right.

AUDIENCE MEMBER: So what would you say to the notion that once a non-legal is in the United States that they can expatriate from the nation that they came from? Wouldn't that make them not subject to the country they came from anymore, therefore they'd be subject to the jurisdiction of the United States because of their expatriation?

JOHN EASTMAN: They can, except the expatriation model flows from the consent model. And you have the natural right to renounce your allegiance. That doesn't give you a natural right to demand that somebody else welcome you into their allegiance. It's a mutual consent requirement. And one of the early stories about the Indian context, at some point the United States government said, "Okay, you're all citizens." And they said, "Well, wait a minute. That's a nice offer, but we only become citizens if we accept your offer." There's a bilateral consent, and I think there needs to be a bilateral consent there. And where I believe the Fourteenth Amendment drew the line is, if you have migrated to this country legally, taken up permanent residence in accord with our laws, we have now on the United States side manifested our consent. You by doing so have manifested your consent. Your children will be citizens. But if you are here by definition contrary to our laws, then by definition you don't have that consent on the United States side, so there has to be some other theory for your children to be citizens other than consent. And I fully concede that there are a lot of pre-Civil War cases, antebellum cases, that just kind of unthinkingly apply the old British common law, because we adopted the old British common law to the extent not inconsistent with the Declaration. My point is, when they finally got around to kind of digging down into what that meant and realized that it was contrary to the consent principle, they changed it. And that's what the Fourteenth Amendment did. He disagrees.

DEAN ALEX ACOSTA: Second row, the young woman. I'm sorry, I'm blanking.

AUDIENCE MEMBER: Don't worry.

DEAN ALEX ACOSTA: And I see lots of hands, but I'm trying to call on folks that haven't yet spoken.

AUDIENCE MEMBER: Miriam.

DEAN ALEX ACOSTA: Yeah.

AUDIENCE MEMBER: Okay. Dean Eastman, you mentioned several times that . . .

DEAN ALEX ACOSTA: I'm sorry. If I could interrupt, I had a thought up here before you start, and I see some students are leaving. We have these debates in schools all the time. Before you go, and before folks leave. And I think that it would be fascinating to turn this into a bit of a focus group. So I'm going to ask that, before you leave, you leave a piece of paper up here with either "Eastman," "Roman," or "tied." I'm not sure if I'm going to announce it, but I'm curious . . .

EDIBERTO ROMAN: I'm getting a grade?

DEAN ALEX ACOSTA: That's why I'm not taking a public vote. That's why I'm just saying leave a piece of paper right by . . .

JOHN EASTMAN: Or how about, "I don't agree with him, but he made some good points."

EDIBERTO ROMAN: There we go.

[laughter]

AUDIENCE MEMBER: I think that makes good sense.

DEAN ALEX ACOSTA: Second row.

AUDIENCE MEMBER: You mentioned several times that [indiscernible] power of a [indiscernible], and I think that [indiscernible] based on the wrong thing, which is [indiscernible]. However, in light of *Marbury v. Madison* and judicial review, to what extent do you think the court has the power to overturn potentially unconstitutional immigration legislation, for example, provisions that arguably violate equal protection.

JOHN EASTMAN: Yes, a very good question. The Congress in the exercise of its plenary power cannot violate other provisions of the Constitution. So if the floor of automatic citizenship is as high as Professor Roman says it is, if Congress tried to define citizenship lower than that, that would be unconstitutional. If the floor is where I say it is, they couldn't even go below that floor, that would be unconstitutional. But how far above the floor is an exercise of their plenary power? And so what we're trying to do is to define what that constitutional floor is. And I think if Congress violates that floor, wherever it is, it would be unconstitutional. That you agree with, right? We found another area of agreement. We just disagree on where the floor is.